1/14/60

Memorandum No. 9 (1960)

Subject: Study No. 53(L) - Personal Injury Damages

In 1957 the Legislature directed the Commission to make a study to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person.

The Legislature also in 1957 amended Civil Code Section 171c and enacted Section 163.5. Prior to 1957 an award of damages for personal injuries to either spouse was community property. The 1957 legislation changed the law to provide that damages recovered for personal injury are the separate property of the injured spouse.

Because of the 1957 legislation to the Civil Code sections, the Commission at its August 1957 meeting agreed that funds to hire a research consultant for this study should not be committed at that time. No further action has been taken on this study by the Commission.

There are no decisions construing the 1957 legislation (Civil Code Sections 171c and 163.5). However, a hasty check of recent decisions involving personal injuries (District Court of Appeals and Supreme Court) reveals that all but one of the personal injuries occurred prior to 1957. Several suggestions have been received and several Law Review articles have been published pointing out defects and problems in the 1957

legislation. (See attached material; see also 32 Cal. S.B.J. 507 (1957); 45 Calif. L.R. 779 (1957); 9 Hastings L.J. 291 (1958).)

The 1959 Conference Resolution of the Womens Lawyers Club of Los Angeles, forwarded to Mr. Stanton by Mr. Hayes (December 16, 1959) (copy attached), makes it desirable for the Commission to re-examine its previous decision to defer hiring a consultant. Because of the interest in this study and the apparent defects in the 1957 legislation, the Commission may want to commit funds (budgeted to cover studies assigned by the 1959 Legislature) to hire a research consultant at this time to undertake this study with the understanding that the Commission does not intend to submit a recommendation on this topic until the 1963 Session. Having the study available after the 1961 Session would make it possible to report on this topic in 1963. At the same time, the Commission should be aware that we are accumulating a substantial number of completed studies that we will not be considering until after the 1961 legislative session. The justification for hiring a consultant now would be that this is a study that is more in need of revision than other topics on which we have already received the consultant's study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1/14/60

SUMMARY OF COMMUNICATIONS RECEIVED

CONCERNING 1957 LEGISLATION - re Personal Injury Damages

The various problems raised in regard to the 1957 legislation (Civil Code Sections 163.5 and 171c) by the three articles (cited in the attached memorandum) can be briefly summarized as follows:

(1) The enactment of Section 163.5 was intended to abolish in personal injury cases the doctrine of imputed contributory negligence between spouses. However, it is suggested by one writer (and by Mr. Hupp) that in certain circumstances the argument can be made that Vehicle Code Sections 17150-17158 (formerly Section 402) are applicable and that the doctrine of imputed contributory negligence prevents a recovery of damages.

(2) Recoveries received by way of a settlement are not expressly covered by Section 163.5, for the scope of the statute is limited to "All damages . . . awarded." Thus, settlements received for personal injuries may be community property. One writer reasons that since the award for personal injuries is separate property, the cause of action should also be deemed separate property. Therefore, a settlement by the parties involved in a personal injury action would be separate property.

(3) The major problem concerns the law of damages. This problem is discussed in the articles, mentioned by Justice Shinn and a solution is proposed by the 1959 Conference Resolution.

Section 163.5 provides that "All damages, special and general, awarded . . . are . . . separate property." The literal application of this provision could result in inequities. For example, the recovery for medical expenses paid out of community funds is the separate property of the injured person. One writer reasons that where the injured party is the wife the general rule still would apply in that the husband, as manager of the community property, has the right under Section 427 of the Civil Code of Procedure to maintain an action for moneys paid out of the community fund for medical expense. This reasoning is based on the fact Section 427 was not amended and this, it is suggested, is an indication of the legislative intent to retain this principle.

Where the injured party is the husband, the wife has no recourse to protect her interest in the community funds since the wife is neither a necessary nor proper party to an action. Again, there is speculation on the part of one writer that the reasoning used above could be used by the courts to hold that a recovery for medical expenses incurred is community property.

The recovery of an award for the impairment of future earnings under Section 163.5 is also the separate property of the injured spouse. It is agreed by the writers that the other spouse has no legal claim of any part of the recovery for impairment of earning capacity. By means of an oral agreement the spouse receiving the award can, if he wishes, transmute his separate property to community property. But if the character of the separate property is not converted to community and the recipient of the award dies testate he can inadvertently or intentionally deprive the surviving spouse of all his separate property. And, too, the inheritance tax

aspect is a factor to be considered; even though the surviving spouse might receive the separate property, such property is taxed in its entirety.

(4) Other problems raised:

(a) The effect Section 163.5 has on suits between spouses to recover medical expenses paid.

(b) What law applies where an injury occurs in this state to a married person domiciled in a state that applies the imputation of negligence rule.

(c) Since the reason for collateral estoppel no longer exists, is collateral estoppel any longer a defense.

THE STATE BAR OF CALIFORNIA

2100 Central Tower
San Francisco 3
GArfield 1-5955

December 16, 1959

Thomas E. Stanton, Jr., Esq., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

Enclosed please find copy of 1959 Conference Resolution 57. The Resolutions Committee of the Conference disapproved the resolution for the reason that the subject matter is on the current agenda of the California Law Revision Commission. The Conference, however, approved the resolution in principle.

At its November, 1959, meeting the Board of Governors directed that the resolution be called to the attention of the Commission for its information.

Very truly yours,

JAH:ob
enc.

Jack A. Hayes
Secretary

cc: Messrs. Enersen and DeMoully
w/enc

RESOLUTION PROPOSED BY WOMENS LAWYERS CLUB OF LOS ANGELES

RESOLVED that the Conference of State Bar Delegates recommends to the Board of Governors of the State Bar of California that the State Bar sponsor legislation to amend Civil Code Section 163.5 as follows:

§163.5. All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person, with the exception of any special damages recovered as reimbursement for expenditures actually made out of the community, which special damages shall retain their character as community funds. No imputation of negligence between husband and wife shall be made on the basis of the community property nature of such special damages.

(Proposed new language underlined.)

STATEMENT OF REASONS

When section 163.5 was added to the Civil Code in 1957, the right of the community to be reimbursed for medical and kindred expenses paid out of the community was eliminated from Civil Code Sec. 171c.

It is manifestly unjust that the community may be depleted by the payment of heavy medical expenses without any right to reimbursement from a subsequent recovery of damages.

There is undoubtedly a greater question whether any damages recovered by a married person in a personal injury action should be the separate property of such married person, and it is most appropriate that a study of the entire matter be made by the California Law Revision Commission as now is contemplated (see Report, 34 Jour. State Bar of Calif. 96).

Pending the conclusion of a comprehensive study, the most obviously unjust operation of the code section can be prevented by the enactment of the proposed amendment. If the conclusion after careful study is that the substance of section 163.5 should be retained, the proposed amendment would be essential.

Action on Resolution No. 57

Resolutions Committee: Disapproved.

Reasons: The subject matter is on the current agenda of the California Law Revision Commission.

Conference: Approved in principle.

Transcript: 245-251

BEARDSLEY, HUFSTEDLER & KEMBLE
Attorneys at Law
610 Rowan Building
Los Angeles 13, California

July 15, 1959

Professor John R. McDonough
California Law Revision Commission
School of Law
Stanford, California

Re: Imputed negligence between husband and wife in personal injury actions.

Dear Professor McDonough:

In view of the strong insurance company lobbies in the legislature, this subject may be too hot for the Law Revision Commission to want to touch. Nevertheless, there is a recent and developing area which, I think, bears some study.

In 1957 the Legislature added Section 163.5 to the Civil Code, which makes recoveries by either spouse for personal injuries the separate property of the spouse recovering the same. Hence, the negligence of the husband is no longer imputed to the wife, (or vice versa), for the reason that the damages recovered would be community property and hence partly the property of a negligent spouse. The section was designed to permit recovery by, say, a wife in a situation where her husband, driving, collided with another car, and both drivers were negligent.

The ever ingenious insurance companies are attempting to circumvent the purpose of Section 163.5 in another way - by using Section 402 of the Vehicle Code. Section 402 (a) provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

The patent purpose of this section is to make the owner of a car liable for damage done by the negligence of permissive users. The

legislature pretty obviously intended by this section to encourage the permissive loaning of cars only to responsible people, and to enforce that by making the owner financially responsible. There is no indication in the section that the legislature intended to impute contributory negligence of a spouse to a plaintiff. Certainly, the section only speaks of the "owner" being "liable and responsible for the death of or injury to" injured parties. Nevertheless, the courts have held that Section 402 does require that the negligence of a spouse be imputed to the plaintiff where the plaintiff is an owner of the automobile. Milgate v. Wraith, 19 Cal.2d 297, 300 (1942); Birnbaum v. Blunt, 152 Cal.App.2d 371, 373 (1957); Mason v. Russell, 158 Cal. App.2d 391, 393 (1958). In the husband-wife situation, it is not ordinarily crucial that the spouse of a defendant can be held responsible, because the insurance policy ordinarily would cover both defendant spouses. Because of the holding in the Milgate case, however, it is now becoming crucial where the negligence is being imputed from one spouse to another. In short, Section 402, which was designed merely to provide financial responsibility, is being used to prevent liability from arising. I do not think the legislature intended this, and I suggest that the Law Revision Commission might want to take a look at the basic purposes of Section 402. There seems no good reason to impute the negligence of the driving spouse to the plaintiff spouse in this situation. It certainly goes against the express intention of the legislature in adopting Section 163.5 of the Civil Code. Unless, therefore, the subject is too controversial, I think this might be a proper subject for the Law Revision Commission.

Even if the present interpretation of Section 402, as adopted in the Milgate case, is kept, there are a number of problems which make the whole area very confused. There are a number of possible situations:

1) Where the car is community property and the husband drives, the negligence of the husband will not be imputed to the wife. Cox v. Kaufman, 77 Cal. App.2d 449, 452 (1946); Wilcox v. Berry, 32 Cal.2d 189, 191 (1948); Rody v. Winn, 162 Cal. App.2d 35, 39 (1958); Carroll v. Beavers, 126 Cal. App.2d 828, 834 (1954). The court reasons that if the car is community property, the husband has the right of management and control. Having the right of management and control, the wife has no consent to give or withhold, and hence the husband is not a permissive user. Therefore, the essential element of liability under Section 402, permissive use, is missing.

2) Where the car is jointly owned, (as distinguished from community property) it is a question of fact whether or not there is permissive use. Wilcox v. Berry, 32 Cal.2d 189, 191 (1948). The Wilcox case seems to be the only case on this point. I am not sure this is good law. The usual rule regarding joint

tenancy property or property held in tenancy in common is that both parties have an equal right to management and occupancy. Hence, it would seem that in this case the other joint tenant would have, as in community property, no rights to grant or withhold consent. However, the court held it to be a factual situation, and in the Wilcox case allowed it to be decided on very meager evidence.

3) Where the car is owned as the separate property of one spouse or the other, it seems clear that the other spouse will not be liable if the owning spouse is driving, but both spouses will be liable if the non-owning spouse is driving with the permission os the owning spouse.

The above sets forth fairly accurately, I think, the existing law as to who is liable depending upon the various possible ownerships of the automobile. But the law is in a mess as determining how the automobile is owned. It seems clear that you do not look merely to the pink slip in all cases. Some of the cases on the effect of a pink slip are interesting:

1) Where the husband drives, and the husband and wife are both on the pink slip, there is no presumption that the car is held as community property. In Wilcox v. Berry, supra, the car was in the name of husband "and/or" wife. The court, at page 192, says that the pink slip holding does not raise a presumption that the husband and wife took as community property, because the instrument granting title must refer to the parties as "husband and wife" in order for the presumption to arise that the property is community. Hence, no presumption arose, and the court found the evidence sufficient to sustain a holding that the car was held jointly, and that the wife had granted the husband permission to use it. The wife was hence held liable. In Pacific Tel & Tele. Co. v. Wellman, 98 Cal.App.2d 151, 154 (1950), the car was in both names of the parties. There is no indication as to whether there was an "or" between the names. The court says that there is no presumption that the wife's interest in the car was separate property, because the pink slip is not an instrument in writing within the meaning of Civil Code Section 164. It would appear, therefore, that where the car is registered in the name of both the husband and wife, it may or may not be community property or jointly held property, and there may or may not, as a consequence thereof, be imputed contributory negligence (or negligence). It does seem to me that it should be more definite.

2) Where the wife's name alone appears on the pink slip, and the wife is driving the car at the time of the accident, the plaintiff has been allowed to attempt to show that the car was in fact community property, for the purpose of holding the husband liable as a permissive owner. Rody v. Winn, 162 Cal. App.2d 35, 39 (1958). It would seem to follow that where the husband, being the plaintiff instead of the defendant, is injured when the wife is driving a car registered in her name, the defendant can nevertheless attempt to show that the car was community property, and that the husband was thereby bound by the wife's contributory negligence. Of course, it seems to be assumed that if the car is community property, but the wife is driving, she is a permissive user of the husband, since he has the right of management and control, and hence would have the right (and the duty) to grant or deny permission to use the car.

3) Where the wife is the sole owner according to the pink slip, and the husband is driving, the wife cannot attempt to show the car is in fact community property, and hence absolve herself from liability by reason of Section 402. Dorsey v. Barba, 38 Cal.2d 350, 354-55 (1952). This may seem inconsistent with situation 2 above. The court, however, held that the purpose of the registration laws is to identify the owner of the car for purposes of Section 402 liability, and hence if the wife allows herself to become the sole owner according to the pink slip, she is stuck with Section 402 liability when her husband drives.

The upshot of the above is that in almost all cases, there is room for fairly extensive litigation on the question of who owns the car. There seems to be no one easy way to identify the owner by means of the pink slip for purposes of Section 402 liability, at least where you have a husband-wife situation. It seems to me that the court in the Dorsey case placed its finger upon a point which was ignored by the other cases, i.e., the purpose of the legislature in requiring registration with the Department of Motor Vehicles so as to identify the owner.

At any rate, as it stands now, the insurance companies are going to try to get around the new Civil Code Section by litigating Section 402 liability in all husband and wife cases where possible. It seems to me that this is a misuse of Section 402. If, however, it is a correct use, the law seems to be in an unholy mess in determining when you do and when you do not impute negligence. In most cases, whether negligence will be imputed is purely a fortuitous question.

Needless to say, I have a case involving this problem, which is why the research.

Very truly yours,

/s/ Harry L. Hupp

Harry L. Hupp

HLH:fh

Originator: Clement L. Shinn, Presiding Justice SUGGESTION NO. 2307

District Court of Appeal of California

Second Appellate District Division Three
State Building, Los Angeles 12

Clement L. Shinn
Presiding Justice

February 18, 1958

Mr. John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: 1957 Amendment to Section 171-c and enactment of Section 163.5 of the Civil Code

Dear Mr. McDonough:

It would seem that there is a question as to the right of a husband to recover special damages in the way of expenses paid from his separate funds or community funds which were incurred by reason of injuries to the wife. It may be advisable to have some legislation on the subject. I have not given the matter any serious thought and have no suggestions at present.

Sincerely yours,

/s/ Clement L. Shinn

Clement L. Shinn

CLS:M

1/14/60

SUMMARY OF COMMUNICATIONS RECEIVED

CONCERNING 1957 LEGISLATION - re Personal Injury Damages

The various problems raised in regard to the 1957 legislation (Civil Code Sections 163.5 and 171c) by the three articles (cited in the attached memorandum) can be briefly summarized as follows:

(1) The enactment of Section 163.5 was intended to abolish in personal injury cases the doctrine of imputed contributory negligence between spouses. However, it is suggested by one writer (and by Mr. Hupp) that in certain circumstances the argument can be made that Vehicle Code Sections 17150-17158 (formerly Section 402) are applicable and that the doctrine of imputed contributory negligence prevents a recovery of damages.

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(3) The major problem concerns the law of damages. This problem is discussed in the articles, mentioned by Justice Shinn and a solution is proposed by the 1959 Conference Resolution.

Section 163.5 provides that "All damages, special and general, awarded . . . are . . . separate property." The literal application of this provision could result in inequities. For example, the recovery for medical expenses paid out of community funds is the separate property of the injured person. One writer reasons that where the injured party is the wife the general rule still would apply in that the husband, as manager of the community property, has the right under Section 427 of the Civil Code of Procedure to maintain an action for moneys paid out of the community fund for medical expense. This reasoning is based on the fact Section 427 was not amended and this, it is suggested, is an indication of the legislative intent to retain this principle.

Where the injured party is the husband, the wife has no recourse to protect her interest in the community funds since the wife is neither a necessary nor proper party to an action. Again, there is speculation on the part of one writer that the reasoning used above could be used by the courts to hold that a recovery for medical expenses incurred is community property.

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aspect is a factor to be considered; even though the surviving spouse might receive the separate property, such property is taxed in its entirety.

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(a) The effect Section 163.5 has on suits between spouses to recover medical expenses paid.

(b) What law applies where an injury occurs in this state to a married person domiciled in a state that applies the imputation of negligence rule.

(c) Since the reason for collateral estoppel no longer exists, is collateral estoppel any longer a defense.

THE STATE BAR OF CALIFORNIA

2100 Central Tower
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December 16, 1959

Thomas E. Stanton, Jr., Esq., Chairman
California Law Revision Commission
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

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At its November, 1959, meeting the Board of Governors directed that the resolution be called to the attention of the Commission for its information.

Very truly yours,

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Jack A. Hayes
Secretary

cc: Messrs. Enersen and DeMoully
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(Proposed new language underlined.)

STATEMENT OF REASONS

When section 163.5 was added to the Civil Code in 1957, the right of the community to be reimbursed for medical and kindred expenses paid out of the community was eliminated from Civil Code Sec. 171c.

It is manifestly unjust that the community may be depleted by the payment of heavy medical expenses without any right to reimbursement from a subsequent recovery of damages.

There is undoubtedly a greater question whether any damages recovered by a married person in a personal injury action should be the separate property of such married person, and it is most appropriate that a study of the entire matter be made by the California Law Revision Commission as now is contemplated (see Report, 34 Jour. State Bar of Calif. 96).

Pending the conclusion of a comprehensive study, the most obviously unjust operation of the code section can be prevented by the enactment of the proposed amendment. If the conclusion after careful study is that the substance of section 163.5 should be retained, the proposed amendment would be essential.

Action on Resolution No. 57

Resolutions Committee: Disapproved.

Reasons: The subject matter is on the current agenda of the California Law Revision Commission.

Conference: Approved in principle.

Transcript: 245-251

Meeting

BEARDSLEY, HUFSTEDLER & KEMBLE
Attorneys at Law
610 Rowan Building
Los Angeles 13, California

July 15, 1959

Professor John R. McDonough
California Law Revision Commission
School of Law
Stanford, California

Re: Imputed negligence between husband and wife in personal injury actions.

Dear Professor McDonough:

In view of the strong insurance company lobbies in the legislature, this subject may be too hot for the Law Revision Commission to want to touch. Nevertheless, there is a recent and developing area which, I think, bears some study.

In 1957 the Legislature added Section 163.5 to the Civil Code, which makes recoveries by either spouse for personal injuries the separate property of the spouse recovering the same. Hence, the negligence of the husband is no longer imputed to the wife, (or vice versa), for the reason that the damages recovered would be community property and hence partly the property of a negligent spouse. The section was designed to permit recovery by, say, a wife in a situation where her husband, driving, collided with another car, and both drivers were negligent.

The ever ingenious insurance companies are attempting to circumvent the purpose of Section 163.5 in another way - by using Section 402 of the Vehicle Code. Section 402 (a) provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

The patent purpose of this section is to make the owner of a car liable for damage done by the negligence of permissive users. The

legislature pretty obviously intended by this section to encourage the permissive loaning of cars only to responsible people, and to enforce that by making the owner financially responsible. There is no indication in the section that the legislature intended to impute contributory negligence of a spouse to a plaintiff. Certainly, the section only speaks of the "owner" being "liable and responsible for the death of or injury to" injured parties. Nevertheless, the courts have held that Section 402 does require that the negligence of a spouse be imputed to the plaintiff where the plaintiff is an owner of the automobile. Milgate v. Wraith, 19 Cal.2d 297, 300 (1942); Birnbaum v. Blunt, 152 Cal.App.2d 371, 373 (1957); Mason v. Russell, 158 Cal. App.2d 391, 393 (1958). In the husband-wife situation, it is not ordinarily crucial that the spouse of a defendant can be held responsible, because the insurance policy ordinarily would cover both defendant spouses. Because of the holding in the Milgate case, however, it is now becoming crucial where the negligence is being imputed from one spouse to another. In short, Section 402, which was designed merely to provide financial responsibility, is being used to prevent liability from arising. I do not think the legislature intended this, and I suggest that the Law Revision Commission might want to take a look at the basic purposes of Section 402. There seems no good reason to impute the negligence of the driving spouse to the plaintiff spouse in this situation. It certainly goes against the express intention of the legislature in adopting Section 163.5 of the Civil Code. Unless, therefore, the subject is too controversial, I think this might be a proper subject for the Law Revision Commission.

Even if the present interpretation of Section 402, as adopted in the Milgate case, is kept, there are a number of problems which make the whole area very confused. There are a number of possible situations:

1) Where the car is community property and the husband drives, the negligence of the husband will not be imputed to the wife. Cox v. Kaufman, 77 Cal. App.2d 449, 452 (1946); Wilcox v. Berry, 32 Cal.2d 189, 191 (1948); Rody v. Winn, 162 Cal. App.2d 35, 39 (1958); Carroll v. Beavers, 126 Cal. App.2d 828, 834 (1954). The court reasons that if the car is community property, the husband has the right of management and control. Having the right of management and control, the wife has no consent to give or withhold, and hence the husband is not a permissive user. Therefore, the essential element of liability under Section 402, permissive use, is missing.

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Needless to say, I have a case involving this problem, which is why the research.

Very truly yours,

/s/ Harry L. Hupp

Harry L. Hupp

HLH:fh

Originator: Clement L. Shinn, Presiding Justice SUGGESTION NO. 2307

District Court of Appeal of California

Second Appellate District Division Three
State Building, Los Angeles 12

Clement L. Shinn
Presiding Justice

February 18, 1958

Mr. John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: 1957 Amendment to Section 171-c and enactment of Section 163.5 of the Civil Code

Dear Mr. McDonough:

It would seem that there is a question as to the right of a husband to recover special damages in the way of expenses paid from his separate funds or community funds which were incurred by reason of injuries to the wife. It may be advisable to have some legislation on the subject. I have not given the matter any serious thought and have no suggestions at present.

Sincerely yours,

/s/ Clement L. Shinn

Clement L. Shinn

CLS:M